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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 102

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, *Petitioner*,

vs.

NEEDHAM PACKING COMPANY, d.b.a. SIOUX CITY DRESSED BEEF, A CORPORATION, *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION

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May 31, 1963.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 996

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, *Petitioner*,

vs.

NEEDHAM PACKING COMPANY, d.b.a. SIOUX CITY DRESSED BEEF, A CORPORATION, *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Woodbury County District Court is unreported (R. 61-73), but is printed as Appendix A attached hereto. The opinion of the Supreme Court of Iowa, including the dissenting opinion, printed as an appendix to the petition, has been reported at 119 N.W. 2d 141.

Jurisdiction

The judgment of which review is sought here was entered by the Supreme Court of Iowa on January 15, 1963. A petition for certiorari was filed in this Court on April 6, 1963. On May 10, 1963, Mr. Justice White entered an order ex-

tending the time for respondent to answer the petition to and including May 31, 1963.

Petitioner claims jurisdiction exists in this Court by virtue of 28 U.S.C. 1257(3). However, for the reasons stated below, respondent contends that jurisdiction is invoked prematurely at this time. The decision of the Supreme Court of Iowa is not a final and complete judgment disposing of all elements of the present controversy between the parties.

Questions Presented

1. Whether a decision by the Iowa Supreme Court, under an interlocutory appeal procedure afforded by Iowa law, disposing of a federal issue raised by complaint and answer, but remanding the case for further proceedings in accordance with said decision, constitutes a final and complete order for purposes of review by this Court pursuant to 28 U.S.C. 1257(3), under circumstances where the same issue passed upon by the Iowa Supreme Court is also involved in respondent's counterclaim. The counterclaim remains to be tried by a lower court of the State, and Iowa practice would permit reconsideration of the issue temporarily foreclosed by the Iowa Supreme Court's ruling on petitioner's interlocutory appeal in the event that petitioner were successful in showing, upon trial of the counterclaim, that the facts established that the initial decision had been based on an erroneous factual premise, i.e., that there had been an unjustified strike or walkout by petitioner's members in violation of a no-strike clause.

2. Whether the decision of the Supreme Court of Iowa conflicts with applicable rulings of this Court insofar as it held that a walkout by members of the petitioning union was such a breach of a no-strike clause in the collective bargaining agreement between the petitioner and the respondent company as to permit the respondent, after it

had warned the petitioner and its members that it was terminating the collective bargaining agreement if they refused to return to their jobs, to terminate the contract, thereby relieving respondent of the duty of arbitrating alleged grievances arising subsequent to the walkout.

Statutes Involved

Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185(a), is set forth at pp. 2-3 of the petition.

Rule 332(a) of the Iowa Rules of Civil Procedure provides in pertinent part that:

> "Any party aggrieved by an interlocutory ruling or decision, including one appearing especially whose objections have been overruled, may apply to the supreme court or any justice thereof to grant an appeal in advance of final judgment. Such appeal may be granted after notice and hearing . . . on finding that such ruling or decision involves substantial rights and will materially affect the final decision, and that a determination of its correctness before trial on the merits will better serve the ends of justice. . . ."

Rule 105 of the Iowa Rules of Civil Procedure provides as follows:

> "The court may, in its discretion, and must, upon application of either party, made after issues joined and before trial, separately hear and determine any point of law raised in any pleading which goes to the whole or any material part of the case. It shall enter an appropriate final order before trial of the remaining issues, adjudicating the point so determined, which shall not be questioned on the trial of any part of the case

of which it does not dispose. If such ruling does not dispose of the whole case, it shall be deemed interlocutory for purposes of appeal."

Statement

1. *The Parties and the Collective Bargaining Agreement.* The respondent is a corporation which operates a meat packing plant in Sioux City, Iowa (R. 4). It is engaged in an industry affecting commerce within the meaning of applicable provisions of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185(a). The petitioner is a labor organization within the meaning of applicable provisions of the National Labor Relations Act, 49 Stat. 450, 29 U.S.C. 152(5), and of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185(a). The petitioner, a local union, maintains its principal place of business in Sioux City, Iowa (R. 3). The petitioner is an affiliate of the United Packinghouse, Food and Allied Workers, AFL-CIO (R. 11). The international union has an office and field representative at Des Moines, Iowa (R. 33).

On or about October 1st, 1960, the petitioner (Local Union No. 721) and the international union to which it belongs entered into a collective bargaining agreement with the respondent (R. 11-35). Under paragraph 2 thereof, the respondent recognized the international union and the petitioner "as the sole and exclusive bargaining agency for all the production employees employed by the Company," excluding certain categories of employees not pertinent here (R. 12).

The collective bargaining agreement between the parties provided in paragraph 9 thereof that, during the period of its existence, "the employees shall not engage in, and the Union shall not call or sanction, any slowdown, work stop-

page, or strike, and no lockout shall be inaugurated by the Company." (R. 14). The collective bargaining agreement also contained provisions covering the adjustment of grievances between the petitioner and the respondent (R. 30-32). Paragraph 33(c)(5) thereof provided that "in the event a dispute shall arise between the Company and the Union with reference to the proper interpretation of (sic) application of the provisions of this contract and such disputes cannot be settled by mutual agreement of the parties, such dispute shall be referred to a board of arbitration upon the request of the Union . . . ." (R. 31). The collective bargaining agreement also required that any "grievance must be presented within fourteen (14) days of the occurrence giving rise to such grievance . . . ." If this procedure was not observed, the agreement provided that the grievance "shall be considered completely waived." (R. 30).

2. *The Walkout and Ensuing Strike.* On May 11, 1961, an employee of the respondent and a member of the petitioning union, Anton Stamoulis, left his job and refused to proceed under the grievance procedure by putting his grievance in writing as required by the collective bargaining agreement (R. 58). On that same day, May 11, 1961, 190 other employees, all members of Local No. 721, the petitioner herein, walked off their jobs (R. 58). This action was taken in the face of the respondent's warning that it would be considered a breach of contract (R. 58). The petitioner, the exclusive bargaining agent for petitioner's production employees, admitted in the trial court that employees represented by it "left their jobs at [respondent's] . . . plant on or about May 11, 1961." (R. 63). The trial court, after oral hearing and the filing of briefs (R. 61), but without the taking of evidence, found that there was

"no substantial dispute here as to the facts" (R. 70); employees represented by the petitioner "did engage in a walkout" on May 11, 1961 (R. 64). The respondent denies, however, that it authorized any walkout by the 190 employees on May 11, 1961 (R. 48).

On May 12, 1961, respondent sent a letter to each of the 190 striking employees, advising them that their action in leaving their jobs was in violation of the contract between the union and itself. The letter also advised that if they did not immediately return to work, their jobs would be filled by permanent replacements. The letter further informed the striking employees that the alleged cause of leaving their employment, that is, the discharge of Stamoulis, would be processed as a grievance under the terms of the collective bargaining agreement (R. 58-59). On or about May 15, 1961, at a meeting of petitioner, Local 721 and its members unanimously rejected the offer of the respondent that they return to work and that the Stamoulis case be handled as a grievance, informing respondent of their rejection of its offer on or about May 15, 1961 (R. 59). The respondent treated this rejection as a termination of the employment of Stamoulis and the 190 other employees who had left their jobs on May 11, 1961 (R. 59).

The walkout and the strike which began on May 11, 1961 has continued to date, and picketing in front of the Company's premises has also been continuous since the first day of the walkout (R. 44). The petitioner, in its reply to the respondent's answer in the trial court, denied that it struck against the respondent, or, as alleged by the respondent, set up picket lines in front of the Company's premises. However, as previously stated, petitioner admitted that certain of its members within the bargaining unit repre-

sented by it did leave their jobs on or about May 11, 1961 (R. 48).[1]

On July 5, 1961, a written grievance in behalf of Stamoulis was filed with the respondent, and on the same day a grievance protesting the discharge of 190 other employees was also submitted by the petitioner to the respondent (R. 36-38). On July 12, 1961, the respondent advised the petitioner's field representative that it was declining the request of July 5, 1961, to process the alleged grievances submitted, on the ground that the petitioner and its members by their conduct had repudiated and terminated the collective bargaining agreement of October 1, 1960 (R. 41).

3. *Proceedings Below.* On August 26, 1961, the petitioner filed a suit in equity in the District Court of Woodbury County, Iowa, invoking that Court's concurrent jurisdiction under Section 301(a) of the Labor Management Relations Act of 1947 (R. 3-11). By its petition, the union sought a decree compelling the respondent to submit the grievances filed with the Company on July 5, 1961 to arbitration, allegedly in accordance with the provisions of the collective bargaining agreement (R. 11-35). The respondent answered and filed a counterclaim for damages in the amount of $150,000 for petitioner's breach of the contract of October 1, 1960. In addition, respondent pleaded certain affirmative and legal defenses (R. 42-48). One of the respondent's basic contentions was that petitioner and its members had

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[1] In an unreported opinion and decree issued on July 15, 1961, in *Needham Packing Co., Inc., d.b.a. Sioux City Dressed Beef, a Corporation* vs. *United Packinghouse, Food and Allied Workers, AFL-CIO Local No. 721, et al*, No. 83519 (Equity), the District Court for Woodbury County, Iowa found that Local No. 721 had "advocated and participated," and certain of its officers and members had engaged in, "mass picketing, threats and violence and intimidation of employees" of the respondent. The Court found that such mass picketing, threats, violence and acts of intimidation were "unlawful," and it thereupon issued an injunction against such acts, the injunction having remained in effect since that time.

engaged in a walkout and a strike, contrary to the no-strike clause of the collective bargaining agreement (R. 44). Respondent contended below, and asserts here, that the petitioner's "election of a strike" under the circumstances presented "constituted a waiver of any right" of the petitioner to proceed with the grievances which it had submitted on July 5, 1961 (R. 45). As stated above, petitioner denied that it had engaged in any strike action and asserted that "questions concerning any alleged waiver of [its] right to arbitrate . . . [concern] the merits of the grievance . . . and must be determined solely by the arbitrator. . . ." (R. 48-50).

After the pleadings had been closed, the respondent made application to the trial court to rule upon three points of law, as permitted under Rule 105 of the Iowa Rules of Civil Procedure. After a hearing on the application, the District Court of Woodbury County, in a written opinion, a copy of which is attached hereto, sustained the contentions raised by the respondent. The petitioner promptly applied for and was permitted to take an interlocutory appeal to the Supreme Court of Iowa (R. 78). The Supreme Court affirmed the lower court in its decision of January 15, 1963, holding therein, with one Justice dissenting, that the petitioner had waived its right to arbitrate by a walkout in breach of the no-strike clause of the collective bargaining agreement. The Supreme Court noted that it was "not seriously contended in this court that the 190 workers did not walk off the job and are still refusing to return thereto."[3]

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[3] 119 N.W. 2d 141.

ARGUMENT

I

The Judgment of Which Review Is Sought Is Neither Final Nor Complete

Under 28 U.S.C. 1257(3), this Court reviews only final judgments of state courts. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 67. It is also the well established rule that a state court judgment, to be reviewable here, must be complete in that it finally disposes of all elements of the controversy. *Cotton* v. *Hawaii*, 211 U.S. 162, 170. If the judgment is not one which disposes of the whole case on its merits, it is not final. *Bostwick* v. *Brinkerhoff*, 106 U.S. 3, 4. This Court has consistently declined to undertake piecemeal review of the actions of state courts. *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana*, 226 U.S. 99, 101. A judgment, as the Court said in *Market Street R. Co.* v. *R. R. Commission*, 324 U.S. 548, 551,

> "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

The ruling of the Supreme Court of Iowa which this Court has been asked to review in the instant case is not a final or complete order, ripe for review at this time. It is true that the decision of the Iowa Supreme Court has determined an important federal legal issue in the case. It has decided that a walkout in violation of a no-strike provision in a collective bargaining contract can sustain a judicial determination that the agreement was thereby terminated and the respondent company, against which the

walkout was directed, thereafter could refuse to arbitrate disputes arising subsequent to the walkout and after the termination of the contract. The disposition of that issue, however, does not automatically give rise to appealability of the decision of the Iowa Supreme Court. See, *e.g.*, *Cincinnati Street R. Co.* v. *Snell*, 179 U.S. 395; *Laclede Gas Light Co.* v. *Public Service Commission*, 304 U.S. 398, 400.

In determining the finality of a state court judgment, the local law has been consistently regarded as a material, though not decisive, factor. *Gospel Army* v. *Los Angeles*, 331 U.S. 543, 548. The effect which a state court judgment is accorded under the local rules of practice is germane to a determination of whether or not the judgment is final and ready for review in this Court. *Richfield Oil Corp.* vs. *State Board of Equalization*, 329 U.S. 69, 72.

The appeal which the petitioner took to the Supreme Court of Iowa was from a hearing and determination of points of law by the trial court, pursuant to Rule 105 of the Iowa Rules of Civil Procedure. Rule 332(a) of the Iowa Rules permits an interlocutory appeal in such circumstances "in advance of final judgment." For the appeal to be allowed, however, the Supreme Court of Iowa must find that the ruling of the lower court involves substantial rights, "will materially affect the final decision," and that a determination "before trial on the merits" will better serve the ends of justice. Leading commentators on Iowa civil practice have noted that an interlocutory order under Section 332(a) is one which "does not dispose of the cause, being one that is directed preparatory to a final decision." Messer and Volz, Iowa Practice (West, 1957), Vol. II, p. 363; *Ruth & Clark* v. *Emery*, 235 Ia. 131, 15 N.W. 2d 896.

In affirming the ruling of the lower court, the Supreme Court of Iowa remanded the cause for "further proceedings

pending therein." It did not direct the entry of an order or of judgment prior to a final determination of the issues that remain for resolution. Accordingly, there is not presented here the situation where a decision of the highest court of a state leaves open only the performance of a ministerial act on the part of the trial court. *Bacon & Sons* v. *Martin*, 302 U.S. 642, appeal dismissed for lack of finality, but a final judgment subsequently obtained and dismissed for want of a substantial federal question, 305 U.S. 380; *Crescent Creamery* v. *Milk Control Board*, 305 U.S. 559.

Respondent's counterclaim is still before the lower court; it has not been tried. The trial court has not yet entered any order disposing of the entire controversy between the parties. On the trial of the counterclaim, the petitioner will have full opportunity to present evidence and to argue the question whether there was a breach of the no-strike provision of the collective bargaining contract. If petitioner loses on that issue, it will have another opportunity to appeal to the Iowa Supreme Court and ultimately, if necessary, again seek *certiorari* of this Court. On the other hand, if the union prevails in the trial court and defeats the counterclaim by a showing that the strike or walkout did not violate the no-strike provision of the contract, petitioner will not be without the means to reopen in the Iowa courts the federal issue temporarily foreclosed by the January 15, 1963 decision of the Supreme Court of Iowa that the union was barred from arbitrating the discharge of employees because of their participation in a walkout in violation of a no-strike clause.

Rule 244(h) of the Iowa Rules of Civil Procedure authorizes the granting of a new trial on the basis of errors "of law occurring in the proceeding, or mistakes of fact by the Court." Under Rule 247 of the Iowa Rules, such a motion can be made within 10 days after judgment, and under Rule

335, an appeal of a denial of such a motion may be taken within 30 days after the ruling on the motion. Therefore, should the petitioner defeat the counterclaim on the basis of evidence which establishes that the walkout was not in violation of the no-strike provisions of the collective bargaining agreement, under Iowa procedure it would have available to it persuasive grounds on which to move for a new trial of its original complaint or reconsideration of the earlier rulings of law by the District Court for Woodbury County, and if necessary, to appeal again to the Supreme Court of Iowa.

Indeed, it is doubtful even that resort to a motion for a new trial would be necessary to reopen the petitioner's claim. While the decision of the trial court is, under Rule 105 of the Iowa Rules of Civil Procedure, "final" in the sense that under ordinary circumstances no attack may be made upon it, it was, as has been indicated, treated as "interlocutory" for purposes of appeal to the Supreme Court of Iowa. Thus, under Rule 332(a) a "final decision" is still to be entered. Together, these rules appear to indicate that the decision is, under State procedure, not *res judicata*, but rather establishes only the law of the case. If this be so—and petitioner cites no authority to the contrary—then the ruling is subject to reconsideration by the State courts at any time up to entry of a "final decision" disposing of both the complaint and counterclaim in a final judgment. And while arguably this might be regarded as of no practical consequence if the decision in question were wholly unrelated to the issues remaining for trial, that plainly is not the case here, where an evidentiary hearing on the counterclaim will turn upon issues intimately related to the decision as to which petitioner seeks review by this Court. Moreover, it should be noted that the consideration that trial of the counterclaim might generate additional

federal issues also weighs against assigning finality to the decision here in question. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71.

To put the matter another way, we suggest that, had petitioner awaited final judgment on the entire controversy by the State courts before petitioning for *certiorari*, this Court would not have denied review on the ground that the petition was untimely. This procedure for obtaining Supreme Court review by Iowa litigants is indicated by the terms of Iowa's interlocutory appeal act, and it would plainly be unfair to penalize them for following it. It is perhaps a credit to this petitioner's uncommon diligence that it has seized upon the earliest conceivable opportunity for Supreme Court review. However, the reward should not be the introduction of an uncertain finality rule that conceivably might later block deserved review for a less energetic, but nonetheless quite reasonable, Iowa litigant.

For the foregoing reasons, respondent submits that the decision of the Iowa Supreme Court is not a final and complete judgment ready for review in this Court. And at the least, respondent suggests that the doubt which exists regarding this Court's jurisdiction is a factor which, together with those discussed below, is relevant to the exercise of this Court's discretionary *certiorari* authority.[8]

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[8] *Construction Laborers* v. *Curry*, 371 U.S. 542, and *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, decided this Term, are not to the contrary. In the *Curry* case, the Court considered reviewable a judgment of the Georgia Supreme Court "finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and, instead, is within the exclusive domain of the National Labor Relations Board." 371 U.S. at 548; see also *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 126. In the *Mercantile National Bank* case, the Court had before it a substantial claim, appealable under state law, that a federal statute, rather than a state statute, determines in which state court a national bank may be sued. The Court properly regarded such a claim as "a separate and independent matter, anterior to the merits and not enmeshed in factual and legal issues comprising the plaintiff's cause of action." In

II

The Ruling Below Was Correct; It Raises No Conflict of Decisions

If the decision which this Court has been asked to review were to possess the attributes of a final and complete judgment, nevertheless, independent reasons would exist for denying certiorari in this case. The ruling below was correct on the particular facts presented. Moreover, the holding of the Iowa Supreme Court, contrary to the petitioner's claim, does not depart from authoritative decisions of this Court, nor is it in conflict with recent decisions of several United States Courts of Appeal.

1. At the outset, one contention by petitioner concerning the decisions of the State courts should be set aside because it presents no issue worthy of review by this Court. Petitioner presents as a question: "Whether . . . a court can decide, on the pleadings, that a walk-out violated the no-strike clause even though the union expressly denied such violation." (Pet., p. 2) Obviously, the answer depends on the facts of each case. Here, the petitioner's "denial" consisted of a claim that it had not authorized the strike; but that denial was made in the context of a claim by petitioner for reinstatement of the employees who had concededly walked out and was coupled with a defense of the justness of the strike. The trial court, while recognizing that

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the instant case, no issues are raised, or can be raised, as to the authority and jurisdiction of the Iowa courts to hear and determine the proceedings out of which this appeal arose. *Dowd Box Co.* v. *Courtney*, 368 U.S. 502. Nor, unlike the *Mercantile National Bank* case, *supra*, is there presented an important question of venue wherein federal and state statutes are in conflict, which is unrelated to the issues of fact and law in contest, and which, if not resolved by this Court, might subject the parties to "long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." 371 U.S. 555, 558.

it could not settle any issue turning upon disputed facts, concluded:

> "Even though it is alleged that the Union officers advised against the walkout, it, nevertheless, occurred and the Union is apparently supporting the action of the employees. There is no substantial dispute here as to the facts." (R. 70)

Moreover, it should be noted that the trial court was quite familiar with the circumstances of the strike, since one month before the suit in question was filed that same court, after a full hearing, had issued a permanent injunction against "mass picketing, threats, violence and intimidations" by officers and members of the petitioner. See fn. 1, *supra*. While it is not plain whether the court took judicial notice of this prior proceeding, it is also not clear that it did not. Unfortunately, from the point of view of the clarity of the record, the Iowa Supreme Court's opinion adds nothing relevant to the decision of the trial court on this issue. Presumably, that Court adopted the same approach as the District Court.

If petitioner has a complaint about the adequacy of this conclusion as to facts, surely that complaint is not significant enough to warrant review by this Court. *Egan* v. *Hart*, 165 U.S. 188, 189; *Grayson* v. *Harris*, 267 U.S. 352, 357; and Robertson and Kirkham, Juridisction of the Supreme Court of the United States (1951 ed.), p. 196. Moreover, in this connection it may be noted again that petitioner will have ample opportunity in the trial of the counterclaim to introduce whatever evidence it wishes as to its lack of responsibility for the strike. And with respect to the question of whether any asserted prior actions by respondent could have justified a strike despite the no-strike clause, plainly this is a matter that could be resolved upon the pleadings

alone. The State courts held, quite properly, that a strike of 190 employees which was concededly still going on at the time of the Supreme Court hearing was obviously in violation of the sweeping terms of the no-strike clause.[4] Indeed, apart from registering a complaint about the decision of this question on the pleadings alone, petitioner does not suggest any basis for a contrary conclusion.

2. The question for review, then, should be framed solely in terms of whether a prolonged strike by petitioner, in the circumstances of this case and under the particular contract here involved, justified respondent in terminating the contract, including the arbitration provision. As to this question, we submit that the decision of the Iowa Supreme Court was correct; that it does not conflict with prior decisions of this Court or any Court of Appeals; and that it does not establish any new and far-reaching principle calling for review by this Court.

In the first place, in deciding that the strike was such a breach of the collective bargaining agreement as to justify the respondent in terminating that agreement and refusing arbitration, the State courts did not "usurp the function of the arbitrator." (Pet., p. 6) To the contrary, the courts below followed this Court's well established rule that "whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241. See also *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582.

Petitioner's argument to the contrary rests upon a misreading of the State court decisions which they attack.

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[4] The no-strike clause expresly prohibits the employees from engaging in a work stoppage or a strike *and* the Union from calling or sanctioning them (R. 14).

According to petitioner, "The decision of the Iowa Supreme Courts holds that a court may invade the province of the arbitrator and decide whether an alleged strike was just cause for discharge." (Pet., p. 6) The fact is that the trial court specifically disavowed any such ruling with respect to the discharges, stating:

> "Plaintiff argues that the arbitrator and not the Court should determine whether the walkout was a violation of the terms of the contract or whether it may have been justified by the conduct on the part of defendant. The fact is, however, that this Court is not concerned for the present purpose with whether or not the walkout was justified or whether or not filing a claim with the National Labor Relations Board was not a matter that the arbitrator could have determined. This Court is only concerned with the fact that the plaintiff *did* do these things, and the law is clear that where the parties have agreed to arbitrate and that agreement is a quid pro quo for an agreement not to strike or to lockout, the election to strike or lockout constitutes a waiver and election of remedies." (R. 70)

In sum, the Court specifically declined to pass upon the justness of the discharges, holding only that if petitioner has a remedy it is not arbitration, which it waived. Nor is there anything in the Iowa Supreme Court's opinion to suggest that a contrary view of the matter was entertained by that Court.

Next, the decision of the Iowa Supreme Court, contrary to petitioner's contention, is not at odds with *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254, 259. Rather, the decision is fully in accord both with *Drake Bakeries* and with the companion decision in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238.

In both of those cases, the question was whether the employer could maintain an action for damages based upon an alleged violation of a no-strike provision, or whether instead the employer should be remitted to arbitration. In *Drake*, because of the terms of the collective bargaining agreement, the decision was against the employer; in *Atkinson*, for the same reason, the decision was for the employer.

In the case at bar, petitioner has never contested respondent's right to maintain the counterclaim in court. Rather, it has implicitly conceded that *Atkinson* rather than *Drake* governs that counterclaim.[5] Nor could there be any real argument to the contrary, for here, as in *Atkinson*, it is clear that the arbitration clause was restricted in coverage to *employee* grievances. (R. 30-31) But if respondent did not bargain away its right to maintain such an action for damages for breach of the no-strike agreement, surely that is strong evidence that such a breach would relate to so vital an element of the agreement that the offended party could terminate the entire agreement. Thus, insofar as *Atkinson* establishes respondent's right to refuse to arbitrate its claim for damages, it provides significant support for the result reached by the State courts.

In *Drake Bakeries*, the Court rejected a contention by the company that the asserted breach of a no-strike clause by the union justified the company's refusal to arbitrate. The factors stressed by the Court as relevant to that decision are important in the case at bar by virtue of their absence. First, in *Drake*, as the Court emphasized, under the agreement the company had agreed to arbitrate its claims under

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[5] In its reply brief before the Iowa Supreme Court, petitioner said:

"Neither appellant nor the appellee is contesting on this appeal that any claim for damages for alleged violation of a no-strike clause is the subject of grievances or otherwise before this Court (Reply Brief p. 13).

the no-strike clause, 370 U.S., at 262, whereas here the company did not. Second, in *Drake* the company did not attempt to terminate the entire contract, 370 U.S., at 261, whereas here respondent did precisely that by notifying petitioner that it regarded the agreement as ended in all respects. (R. 41, 42). Finally, as opposed to the one-day duration of the *Drake Bakeries* strike, 370 U.S., at 265, here the strike was by a large number of employees and for a prolonged period of time.

We submit therefore, that the decision in question was amply warranted upon the basis of the "circumstances of the claimed repudiation," which *Drake Bakeries* indicates is the proper test. 370 U.S. at 262. Such determinative circumstances include the cause, nature, scope and duration of the strike; the limited language of the arbitration clause, under which the company's claim for damages is not arbitrable; the broad language of the no-strike provision; and the unequivocal and total rescission by respondent after ample warning that this would be the result of continuation of the strike.

There is, to be sure, language in the Iowa Supreme Court opinion relating to the *quid pro quo* theory stated in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 455, a doctrine which has been substantially impaired by *Drake Bakeries* if it be taken to mean that *any* violation of a no-strike provision justifies the employer *in all cases* in terminating the collective bargaining agreement. This, of course, is not respondent's theory, nor need it be resorted to in support of the decision in this case. On the other hand, if the *quid pro quo* theory be taken to mean only that in a particular case under the provisions of a particular collective bargaining agreement the no-strike clause is of such importance that a substantial violation of it permits the employer to terminate the agreement, then it is consistent with the considerations

advanced above in support of the decision. Again, the opinion of the Supreme Court of Iowa on this subject is not wholly clear. However, as we have indicated, the decision is proper, and we urge that this Court not grant *certiorari* in order to correct ambiguous language in an opinion, especially where this Court has spoken clearly on the subject already, so that it cannot reasonably be supposed that the opinion below will be misleading in future litigation.

3. We find nothing in the three lower court decisions relied upon by petitioner to justify a grant of *certiorari*. No conflict has been demonstrated.

Jefferson City Cabinet Co. v. *International U. of E., R. & M.W.*, 313 F. 2d 231 (C.A. 6, 1963), *cert. den.*, 31 U.S.L.Wk. 3388, is plainly inapposite The question there was solely whether, under a collective bargaining agreement requiring arbitration of *both* company and union claims of contract violation, the company's claim for damages for breach of a no-strike clause was subject to arbitration. The Sixth Circuit quite properly held that the arbitration clause applied. In contrast, in the case at bar, as has been demonstrated, there can be no question that the company's claim for damages need not be arbitrated.

The other two cases, *International Moulders* v. *Susquehanna Casting Co.*, 283 F. 2d 80 (C.A. 3, 1960), and *United Textile Workers of America* v. *Newberry Mills, Inc.*, 315 F. 2d 217 (C.A. 4, 1963), are somewhat more similar to this one. However, they are readily distinguishable because of the circumstances that led the Courts in those cases to require arbitration of union grievances despite a claimed breach of a no-strike clause. Thus, in *United Textile Workers*, the Court, explicitly following the "relevant circumstances" approach of *Drake Bakeries*, relied upon the facts that the company did not attempt to terminate the entire contract, that the union contended that it had not

only failed to authorize but had actively opposed the strike, and that the company had admitted that the strike might have been called over a non-arbitrable matter, 315 F. 2d, at 219-220. And in *International Moulders* there was involved a strike for just a portion of a day by only some 30 employees and a broader arbitration clause than exists in this case.

If the "relevant circumstances" test is to be applied in cases of this type, obviously there will be some cases in which arbitration will be ordered and some in which it will be denied. This can hardly be claimed to present a conflict of decisions unless the relevant circumstances are indistinguishable, which they are not as to the decisions here involved.

4. To restate our position, only if this Court is willing to depart from the approach indicated by *Drake Bakeries* and *Atkinson* and rule that in *no* circumstances can breach of a no-strike clause justify repudiation by the company of a collective bargaining agreement might the case at bar present an issue worthy of review. While it would be inappropriate for respondent to comment at length upon the merits of such a departure from prior law, we respectfully suggest that the results under the existing approach indicate that the flexibility it permits may well prove most desirable, and that at the least the lower courts should be given a further opportunity to follow that approach. Moreover, as we have indicated, in view of the jurisdictional and state procedural problems in the case at bar, it hardly provides an adequate vehicle for a far-reaching reconsideration of this important area of labor law.

On the facts of the instant case, petitioner had the right "to terminate the entire contract . . . [and] to extinguish permanently its obligations under the arbitration provisions" of the collective bargaining agreement. *Drake*

Bakeries v. *Bakery Workers*, 370 U.S. 254, 261. The decision of the Iowa Supreme Court of course does not any more than applicable decisions of this Court, mean that every walkout or strike in violation of a no-strike clause requires the conclusion that the striking employees have waived arbitration rights given them in a collective bargaining agreement. However, surely at least until this Court has held otherwise, it is the law that in appropriate circumstances an unauthorized strike in violation of a no-strike clause may constitute such a breach of the collective bargaining agreement as to justify the employer in treating it as abrogated. Ann., 8 L. Ed. 1013. Those circumstances exist in this case.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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May 31, 1963.

APPENDIX A

That after oral hearing and submission of Briefs at Court on February 13, 1962, Judge George M. Paradise made the following ruling upon Defendant's Application to Hear and Determine Points of Law raised in the Pleadings under Rule 105, Rules of Civil Procedure:

RULING

The plaintiff commenced this case against the defendant and in its prayer for relief prayed that the Court enter an order enjoining defendants from failing and refusing to arbitrate certain grievances claimed by plaintiff and asking specific performance by defendant of an agreement to arbitrate contained in a collective bargaining contract between plaintiff and defendant, copy of which contract is set out in the plaintiff's petition.

Defendant has answered, admitting the contract and denying that plaintiff has complied with the grievance procedure set out in said contract and has alleged affirmatively that plaintiff and the employees represented by plaintiff in violation of their agreement to arbitrate grievances, left their jobs and set up a picket line in front of defendant's premises and that said strike is continuous. Defendant further pleads affirmatively that the strike was contrary to the provisions of Section 9 of the contract providing that,

> ". . the employees shall not engage in and the Union shall not call or sanction any slow down, work stoppage or strike . ."

and that by engaging in said "slow down, work stoppage or strike" plaintiff had waived the provisions of Section 33 of said contract providing for grievance procedure and binding arbitration of any dispute

> "between the Company and the Union with reference to the proper interpretation or application of the provisions of this contract . ."

Defendant in its answer further alleges that the right to arbitrate had been waived by the filing by plaintiff of an unfair labor practice charge against defendant with the National Labor Relations Board involving the matter in dispute between the parties.

Defendant further alleged that the application for specific performance of the arbitration provision in the contract came too late and was waived by the provision in the contract, Section 33(b),

> "Any grievance must be presented within fourteen (14) days of the occurrence giving rise to such grievance .... or it shall be considered completely waived."

Plaintiff filed reply in which it is admitted that the employees represented by the plaintiff

> "Left their jobs at defendant's plant on or about May 11, 1961,"

Plaintiff's reply further admits that it filed a charge complaining of violation by defendant with the National Labor Relations Board.

By amendment, plaintiff amended its answer, striking Paragraph 5 thereof wherein it was alleged that defendant discharged 191 persons on or about May 17, 1961, and striking from Paragraph 6 of the petition the date May 17, 1961 and substituting therefor an allegation that the said discharges occurred on June 26, 1961.

In ruling upon an application to determine points of law raised by the pleadings, the Court can consider only matters alleged as facts by the plaintiff or alleged by defendant and not denied by plaintiff. Matters on which there is a dispute as to the facts and on which evidence is necessary, cannot be determined by the Court on rulings on points of law. It is apparent to the Court that plaintiff and defendant had entered into a collective bargaining agreement, copy of which is set out as Exhibit "A" attached to plaintiff's petition, and that such contract provided, in Sections 9 and 33 thereof, that the parties would not engage in or sanction any slow down, work stoppage or strike and no lockout dur-

ing the period of the agreement. As quid pro quo therefor, the contract provides in Section 33 thereof a complete provision for "adjustment of grievances" by setting up a procedure for adjusting and handling any dispute between the parties with reference to the proper interpretation or application of the contract. Said procedure consists of a five-step process for handling grievances, terminating in binding arbitration. In other words, the contract was obviously intended to provide a peaceful method for settling any and all disputes between the parties relative to interpretation or application of any of the provisions of the contract and to render unnecessary or improper on the part of either party of a resort to economic pressure, such as a slow down, walkout or lockout. It is apparent from the pleadings and facts therein alleged, or not denied, that a dispute between the parties relative to the "interpretation or application" of the provisions of the contract did arise and that the employees represented by plaintiff did engage in a walkout and did file charges of unfair labor practice with the National Labor Relations Board With the merits of the controversy, this Court is not as this time concerned.

Law Points Raised By Defendant

Defendant has made application to the Court to rule as a matter of law that:

1. Plaintiff is not entitled to specific performance of the agreement to arbitrate the dispute for the reason that the agreement is at this time executory and that under Iowa law and procedure an executory agreement to arbitrate will not be specifically enforced.

2. Plaintiff is not entitled to specific enforcement of the arbitration provision in the contract by reason of having waived such agreement by engaging in a slow down or walkout contrary to the provisions of its contract and by reason of having filed unfair labor practice charges regarding the dispute with the National Labor Relations Board. Defendant claims that plaintiff has made an election of remedies and cannot thereafter resort to arbitration.

3. Defendant claims that the application for arbitration

by plaintiff comes too late since the petition of plaintiff claims that the discharges occurred on May 17, 1961 and the grievance applications, attached to the petition as Exhibits "B" and "C", show that they were presented July 5, 1961 and more than fourteen (14) days after the "Occurrence giving rise to such grievance" as provided by Section 33(b) of the contract.

The Court heard oral arguments of the parties on the question of ruling on law points and the parties filed written briefs which have been carefully considered by the Court, and the Court now makes the following:

Ruling on Law Points

Law Point Three

Following the filing by defendant of its application to rule on law points, plaintiff amended its petition so as to allege that the discharges complained of occurred June 26, 1961 instead of May 17, 1961 and, therefore, within fourteen (14) days of such occurrence.

Since the Court can rule as a matter of law only upon facts stated or admitted in the pleadings, it must be taken as true for the purpose of this ruling that the occurrence complained of occurred within the said fourteen (14) day period, and, therefore, the third point raised by defendant is not sustained and the Court finds and rules as a matter of law that the notices of grievance were not served too late under the terms of the contract.

Ruling on Law Point One Raised By Defendant

Defendant contends in Law Point One that the plaintiff is not entitled to the relief asked, for the reason that under the law and precedents binding upon an Iowa Court specific performance of an executory agreement to arbitrate cannot be granted.

It is apparently conceded by both parties, and the research by the Court makes it clear, that the rule at common law, and in a large majority of the States, was and is that an executory agreement to arbitrate will not be specifically

enforced. As stated in 3 Am. Jur. "Arbitration and Award" Section 31,

> "It is settled at common law that a general agreement, in or collateral to a contract, to submit to final determination by arbitrators the rights and liabilities of the parties with respect to any and all disputes that may thereafter arise under the contract is voidable at will by either party at any time before a valid award is made, and will not be enforced by the courts."

The same rule is announced by 6 C.J.S. "Arbitration and Award" Section 33 and by the following Iowa cases:

Oskaloosa Sav. Bank v. Mahaska Bank, 205 Iowa 1351, 219 N.W. 530, 60 A.L.R. 1204
Read v. State Ins. Co., 103 Ia. 307, 72 N.W. 665
Donald v. C. B. & Q. Ry. Co., 93 Ia. 284, 61 N.W. 971
Ames Canning Co. v. Dexter Seed Co., 195 Ia. 1285, 190 N.W. 167

In the Ames case, supra, the Iowa Supreme Court said,

> "The right of a party to a mere naked agreement for submission of a controversy to arbitration, to revoke it at any time before decision has been reached or an award made is recognized by the weight of authority."

It is contended, however, by the plaintiff that Section 301(a) of the Labor Management Relations Act, providing for enforcement of labor contracts in Federal Court, has changed the common law rule and that the Federal law is now binding on State Courts.

Section 301(a) Labor Management Relations Act is as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, . . . may be brought in any district court of the United States having jurisdiction of the parties, without re-

spect to the amount in controversy or without regard to the citizenship of the parties."

(1947 Taft-Hartley Amendment).

This statute was interpreted by the United States Supreme Court in 1956, Textile Workers v. Lincoln Mills, (353 U.S. 448, 32 L.C. 70, 733), as authorizing the Federal Court to specifically enforce an arbitration agreement. It is noted that nothing in this statute refers to State Courts or purports to be binding in the case of State procedure.

It must be conceded that there is a conflict of authority on the question of whether or not Section 301(a) Labor Management Relations Act, as interpreted in the Lincoln Mills case is binding upon State Courts. Both State and Federal Courts are in conflict on the matter. So far as this Court is able to determine the matter has not been authoritatively passed upon by the United States Supreme Court, and, therefore, this Court deems itself bound to follow Iowa precedents and holds as a matter of law that plaintiff is not entitled to specific performance of the agreement to arbitrate disputes.

RULING ON LAW POINT TWO RAISED BY DEFENDANT

Defendant's second point of law is that plaintiff has waived its right to arbitrate by

1. Indulging in a walkout and picketing in violation of the terms of its contract; and
2. By filing an unfair labor practice charge with the National Labor Relations Board concerning the dispute in question.

Defendant contends that there has been an election of remedies and plaintiff cannot, after having agreed not to strike and to arbitrate differences, pursue a remedy inconsistent with arbitration, and to do so is to forfeit and waive such right.

It is abundantly apparent to the Court that by the terms of the contract between the parties, it was intended that a dispute such as occurred in this case would be settled by the

grievance and arbitration procedure set out in the contract. It is equally clear that the plaintiff and its members chose to disregard the arbitration provision and engaged in a walkout. Even though it is alleged that the Union officers advised against the walkout, it, nevertheless, occurred and the Union is apparently supporting the action of the employees. There is no substantial dispute here as to the facts. Plaintiff argues that there was no waiver for the reason that the question of whether or not the action taken by the employees was right or wrong is a matter that should be determined by arbitration since it involves the interpretation and application of the contract. Plaintiff argues that the arbitrator and not the Court should determine whether the walkout was a violation of the terms of the contract or whether it may have been justified by conduct on the part of defendant. The fact is, however, that this Court is not concerned for the present purpose with whether or not the walkout was justified or whether or not filing a claim with the National Labor Relations Board was not a matter that the arbitrator could have determined. This Court is only concerned with the fact that the plaintiff *did* do these things, and the law is clear that where the parties have agreed to arbitrate and that agreement is a quid pro quo for an agreement not to strike or to lockout, the election to strike or lockout constitutes a waiver and election of remedies. Having elected, the parties may not thereafter resort to the remedy which they have waived.

In this case the law seems to be abundantly clear.

A very good case which states the doctrine clearly is Cuneo Press v. Kokomo Paper Handlers (U.S.C.A. 7th (1956) 30 L.C. No. 70,084, 235 F. 2d, 108, Cert. Den. 352 U.S. 912). The Union and the employer had a contract providing for arbitration and agreeing that there would be no strike or lockout. The Union staged a sitdown or wildcat strike. The employer brought an action in Court for breach of contract and the Union filed a motion to stay pending arbitration. In denying the motion, the Court said:

> "Even if the unions originally had an issue referrable to arbitration, they chose instead to resolve that issue in their favor by use of their economic strength.

> Having thus violated their contract to plaintiff's damage, it was too late for them to demand arbitration on this issue."

The Cuneo case has been followed and cited repeatedly. In the year 1960 the Cuneo case was relied upon by Portland Web Pressmen's Union v. Oregonian Pub. Co. 188 Fed. Sup. 859, Aff. (on another ground), 286 Fed. 2d, 4, Cert. Den., 366 U.S. 912.

Another case is Western Express Co. v. Brotherhood of Railroad Trainmen (NY Sup. Ct. App. Div. (1950) 18 L.C. No. 65,980). In this case the question was whether a party to an agreement to arbitrate may obtain a Court order compelling arbitration after the party has taken action which amounts to an abandonment of the agreement to arbitrate, and it was the employer who had taken such inconsistent action by filing with the National Labor Relations Board. The Court said:

> "Where an employer files with the NLRB against a union unfair practice charges involving the same dispute as is the subject of an arbitration proceeding, such action amounts to an abandonment of the agreement between the employer and the union to arbitrate that subject. The employer is not thereafter entitled to compel the union to arbitrate on the subject."

Many other cases are cited in the above cases.

On the question of election of remedies, a recent U. S. Supreme Court opinion in 1959 has also been relied upon, Union Pacific Ry. v. Price, (1959) 360 U.S. 601, 37 L.C. No. 65,559.

I have found no cases contrary to the authorities above cited. The cases cited by plaintiff seem to rely entirely upon the question of whether or not the remedy *elected* by the party at fault was or was not subject to arbitration. This Court is satisfied that where parties have agreed to settle by arbitration and have failed to proceed to arbitrate in the manner or at the time agreed upon, but have, instead, chosen to rely upon their economic strength and have elected a remedy which they agreed they would not pursue, they

cannot thereafter go back and demand the remedy which they have waived.

It Is Therefore the finding and ruling of the Court that it appears as a matter of law that plaintiff has waived its right to arbitration in this case by electing the walkout or strike and by filing an unfair labor practice claim with the National Labor Relations Board.

The ruling of the Court sustaining defendant's contention in its application for ruling on law points hereinabove stated, constitutes a final order on the points so ruled upon. Since the ruling does not dispose of the whole case, however, it is interlocutory for the purposes of appeal.

(7111-8)